

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MELVIN LEE MORRIS, SR.,

Petitioner,

vs.

MATTHEW KRAMER, Warden,

Respondent.

No. C 08-1579 PJH (PR)

**ORDER DISMISSING
PETITION WITH LEAVE TO
AMEND**

Petitioner, a California prisoner currently incarcerated at Folsom State Prison, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee.

Venue is proper because the conviction was obtained in Alameda County, which is in this district. See 28 U.S.C. § 2241(d).

BACKGROUND

Petitioner was found guilty of violating his probation. He was sentenced to prison for ten years. He contends that he raised these claims on appeal or in state habeas petitions.

DISCUSSION

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). It shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." *Id.* § 2243.

Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court must “specify all the grounds for relief which are available to the petitioner ... and shall set forth in summary form the facts supporting each of the grounds thus specified.” Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. “[N]otice’ pleading is not sufficient, for the petition is expected to state facts that point to a ‘real possibility of constitutional error.’” Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970) (hereinafter “Rule 4 notes”). “Habeas petitions which appear on their face to be legally insufficient are subject to summary dismissal.” *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring).

B. Legal Claims

In his first issue petitioner contends that his counsel was ineffective. In the section for “[s]upporting [f]acts” he has written (capitalization has been corrected): “Trial attorney did not investigate court claim of petitioner waiving time credits that extended probation, or challeng[e] courts['] failure to hold revocation hearing in due process. Further counsel did not argue violation or offer contrary evidence.” This simply is not sufficient explanation of the claim to point to a real possibility of constitutional error. It is not possible from this to understand the point about waiving time credits, and the reference holding “revocation hearing in due process” makes no sense. This claim will be dismissed with leave to amend to provide a more extensive factual basis for the claim.

In his second issue petitioner asserts that the revocation procedure violated his due process rights. In the “[s]upporting [f]acts” section for this claim he has written (capitalization again has been corrected): “Trial court failed to advise petitioner of his right to a formal hearing – there was no notice of claimed violation & evidence – petition to revoke probation allege[d] one ground but probation revoked on another ground.” That is, there are three grounds here, (1) that the court did not advise him of his right to a formal hearing; (2) that he received no notice of the claimed violation or (presumably) the

evidence to support it; and (3) that probation was revoked on a ground other than the one alleged in the petition to revoke.

These allegations are insufficiently clear to show a real possibility of constitutional error. See Rule 4 notes (standard). Although the first two issues appear to be among those presented on direct appeal, the court of appeal also had trouble sorting out what petitioner was trying to claim. See *People v. Morris*, 2007 WL 2171467, *2-3 (Cal. App. July 30, 2007). As to the first claim, petitioner received a formal revocation hearing simultaneously with the trial, so it is unclear why it would matter whether he had been advised of a right to a formal hearing, and the second claim seems to be contradicted by the third – in the second he complains of not receiving notice, but in the third he says that there was a petition to revoke. And in the third issue he does not say what the basis was for the revocation or what basis was alleged in the petition to revoke, so the purported inconsistency is not explained. To show a real possibility of constitutional error petitioner must do better than this; the second ground (containing the three issues listed in the paragraph immediately above) also will be dismissed with leave to amend. If petitioner does not make clear what his claim is and provide clear factual allegations sufficient to show a real possibility of constitutional error, this claim will be dismissed without further leave to amend.

CONCLUSION

For the foregoing reasons,

1. The petition is **DISMISSED** with leave to amend within thirty days from the date of this order. The amendment must be on the court's form for prisoner section 2254 petitions and must include the caption and civil case number used in this order and the words AMENDED PETITION on the first page. Petitioner may use extra pages for the "Statement of Claim" section if necessary to clarify his contentions. Failure to amend within the designated time will result in the dismissal of these claims.

2. Petitioner must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the

dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

IT IS SO ORDERED.

Dated: October 23, 2008.



PHYLLIS J. HAMILTON
United States District Judge

United States District Court
For the Northern District of California

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